SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 107.

INTERNATIONAL SHOE COMPANY, a Corporation,
Appellant,

vs.

STATE OF WASHINGTON, OFFICE OF UNEMPLOYMENT COMPENSATION AND REPLACEMENT and E. B. RILEY, Commissioner,
Appellees.

Appeal from the Supreme Court of the State of Washington.

APPELLANT'S BRIEF.

LEOPOLD M. STERN,
T. M. ROYCE,
LAWRENCE J. BERNARD,
JACOB CHASNOFF,
ABRAHAM LOWENHAUPT,
Counsel for Appellant.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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APPELLANT'S BRIEF.

INTRODUCTION.

This is an appeal from the decision and judgment of the Supreme Court of the State of Washington *en banc* finally entered by that Court on February 6, 1945 (R. p. 113). Probable jurisdiction was noted by this Court and the case was transferred to the Summary Docket on June 18, 1945, after Appellees had filed their Motion to Dismiss Appeal, Or In the Alternative To Affirm Judgment, and briefs thereon had been filed by both the Appellees and Appellant. In that connection this Court said that it "does not care to hear argument on the question whether the statutes attacked place an undue burden on interstate commerce" (R. p. 123).

OPINIONS BELOW.

The opinion of Jeffers, J., concurred in by the majority of its Judges and adopted by the Supreme Court of Washington, and also that of its dissenting Chief Justice (Simpson, C. J.) concurred in by Justice Millard are officially reported under the style of *International Shoe Company v. State of Washington et al.*, 122 Wash. Dec. 135, and appear in the Transcript of Record at pages 59 ff. and 86 ff.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended [Title 28, U. S. C. A., Sections 344 (a) and 861 (a)] providing for the review by the Supreme Court on appeal, where is drawn in question the validity of a statute of any State on the ground of it being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

STATEMENT.

The proceedings involved in this action were commenced by the State of Washington, Office of Unemployment Compensation and Placement and its Commissioner, E. B. Riley, the Appellees (herein called the "Department"), to assess the liability under statutes of the State of Washington (R. pp. 116-118 and Appendix hereto) for contributions claimed to be due from International Shoe Company as an Employment Unit having in its employ persons performing services for it within that State during the period January 1, 1937, through December 31, 1940. An order and notice of assessment against Appellant corporation (R. p. 1) was served by personal delivery to Edward S. Alley, a sales solicitor employed by Appellant in the State of Washington (R. p. 18). A copy of the notice of assessment was mailed by registered mail addressed to the Company in

St. Louis (R. p. 18). Appellant appeared specially before the Department and moved to quash the service of the notice upon Mr. Alley, objecting to the jurisdiction of the Department to levy the assessment (R. p. 4). As provided by the Washington practice (R. p. 2, infra, Appendix page v), a hearing was had before an appeal tribunal appointed by the Commissioner and at that hearing the cause was submitted upon a stipulation as to the facts in the case together with testimony by one witness.

From the agreed statement of facts it appears that the stipulation was made "for the purpose of presenting to the appeal examiner, and such other tribunals as this matter may come before on appeal or otherwise, questions raised in the proceeding by the Special Appearance, Motion to Quash Service and Objection to Jurisdiction filed by International Shoe Company" (R. p. 15). It was expressly agreed that the stipulation of facts should not constitute a general appearance by the International Shoe Company, but that it should at all times retain such rights as it may have under the special appearance referred to.

The following is a statement of the uncontroverted facts contained in the stipulation (R. pp. 6 to 23, incl.) as amplified by the testimony of Mr. Alley:

Appellant, International Shoe Company, a corporation organized and existing under the laws of the State of Delaware, had a principal office or place of business in St. Louis, Missouri, but no place of business in the State of Washington (R. p. 16). Its principal business consisted of the manufacture and sale of boots, shoes, and other footwear. It maintained places of business, where manufacturing was carried on and from which its merchandise was sold, in the States of Missouri, Arkansas, Illinois, Kentucky, North Carolina, Pennsylvania, New York, and New Hampshire. Its merchandise was sold through several selling divisions or branches, of which those dealing with

residents of the State of Washington were: "Roberts, Johnson & Rand," "Peters," "Friedman-Shelby," and "Specialty."

It maintained no general agent in the State of Washington. It made no contracts, either of sale or of purchase, in that State. It maintained no stock of merchandise there and made no deliveries of merchandise in intrastate commerce in that state (R. p. 16).

It employed from eleven to thirteen sales solicitors (herein and in the stipulation sometimes called "salesmen") residing and having their principal activities in the State of Washington, whose compensation was paid by Appellant in Missouri (R. pp. 16, 17, 19-22, incl.).

The salesmen were all employed from the head office at St. Louis and worked under the direct supervision and control of sales managers with offices in St. Louis; were required as part of their duties to spend certain time each year in St. Louis, Missouri, in order to receive direct personal instructions as to their duties and the lines, construction, and kinds of shoes which were to be offered to the trade (R. p. 16). The salesmen were given sample lines uniformly consisting of only one shoe of a pair. No sales were made by salesmen from such samples, they being merely used to display to prospective purchasers. Some of the salesmen maintained sample rooms in business buildings, paid the expenses of such rental, and were reimbursed on an expense account by Appellant. Others maintained no permanent sample rooms, but rented rooms in hotels or business buildings in the various cities through which they traveled (R. pp. 16, 17).

Transactions between Appellant and persons in business or resident in Washington were conducted as follows: Each salesman was given a designated territory in which to solicit orders. The authority of the salesman was limited to exhibiting to merchants who were prospective buyers, samples of the merchandise for which the salesmen solicited

orders; to endeavoring to procure orders on prices and terms fixed by Appellant; to transmitting to the office of Appellant outside of Washington, for acceptance or rejection, such orders as were obtained. On orders accepted, merchandise was shipped f. o. b. shipping point from outside of Washington—practically all from St. Louis, Missouri. The merchandise was invoiced at point of shipment and invoices were payable at point of shipment, from which point collections were made (R. p. 17).

No salesman had power or authority to bind the Company to any contract or finally to conclude any transaction in its behalf, the salesmen's duties and authority being limited strictly to the solicitation of orders (R. p. 17).

The testimony of Mr. Alley (R. pp. 11 to 14) merely confirmed the facts set forth in the stipulation that all the salesmen, during the period for which the assessment was made, attended instruction meetings or conventions in St. Louis, Missouri, at least once a year, and related in some detail the instruction given the salesmen at those meetings.

The appeal tribunal found the facts as set forth in the stipulation, but denied Appellant's Motion to Quash the original service and its objection to jurisdiction in the proceedings against it and held that the Commissioner was authorized to recover $3,159.24 (R. pp. 23-35, incl.).

Appellant duly filed with the Commissioner of the Department a petition to review the decision of the appeal tribunal, and after such review the Commissioner entered an order confirming the decision of the appeal tribunal (R. pp. 37, 38).

Throughout the proceedings below Appellant, under its special appearance, consistently challenged the jurisdiction of the state officials to assess the tax and of the appellate tribunal and courts to sustain the assessment and tax, inter alia on the ground that the Commissioner had no jurisdiction over the corporation under the Washington statute properly construed, and also on the ground that the State

of Washington had no jurisdiction to impose the tax upon Appellant and that the statute is beyond the state's power if construed to apply to it (R. pp. 4, 9, 15, 40, 44, 54, 59, 109, 111, 115).

The statutes which the State claimed imposed or provided for the imposition of the tax upon Appellant are described in the Assignments of Error (R. p. 116) which challenge the validity, under the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States, of the statutes as applied to Appellant. For the convenience of the Court the text of those statutes insofar as they are pertinent is set forth in the Appendix to this brief.

From the Commissioner's decision an appeal was taken to the Superior Court of the State of Washington for King County, which entered judgment against Appellant affirming the decision of the Commissioner, notwithstanding that in that appeal Appellant again seasonably claimed that the State of Washington was without jurisdiction to sustain the tax (R. pp. 39, 40).

Appellant then appealed to the Supreme Court of the State of Washington in accordance with the laws of that state, and there again seasonably claimed before that court that the statutes above mentioned as construed by the Commissioner and the lower court deprived Appellant of property without due process of law, contrary to the provisions of said Amendment to the Constitution of the United States (R. pp. 48, 54-59).

Thereafter the Supreme Court of the State of Washington, sitting *en banc*, rendered the decision from which this appeal was taken. By its decision the Supreme Court of the State of Washington ruled that the Washington statutes above mentioned did not deprive Appellant of property without due process, contrary to the United States Constitution, stating, "While we are of the opinion that the regular and systematic solicitation of orders in this

state by Appellant's agents, resulting in a continuous flow of Appellant's product into this state by means of interstate carrier, is sufficient to constitute doing business in this state so as to make Appellant amenable to process by the courts of this state, we are also of the opinion that there are additional activities shown which bring this case well within the solicitation plus rule." The record shows no additional activities in the State other than those which were purely incidental to solicitation of orders by the salesmen.

SPECIFICATION OF ERRORS.

Assignments of Error I, II, V, VII, that portion of VIII not relating to Section 8, Article I, of the Constitution, and IX (Record pages 116-118) are here relied upon.

Summarized, the Assignments of Error relied upon challenge:

(a) The validity of the taxing statutes as construed by the State Court and applied by the Commissioner to this Appellant, upon the ground that they violate the due process clause of the Fourteenth Amendment to the Constitution.

(b) The ruling of the State Court that the statutes in question, as construed by it and applied to Appellant, do not deprive Appellant of property without due process of law.

(c) The judgment of the State Court against Appellant for the tax under the conditions shown in the record as violative of the due process clause of the Fourteenth Amendment to the Constitution.

SUMMARY OF THE ARGUMENT.

I.

The assessment of the tax was void for lack of jurisdiction.

Distinction between jurisdiction as relates to suits and jurisdiction with respect to taxation.

A lesser degree of business activity is required to authorize service (for suits) than in other cases (as for taxation).

A. Appellant was not doing such business in Washington as to manifest sufficient presence there to confer jurisdiction over it.

1. Mere solicitation of orders does not confer jurisdiction for suit.

2. Application of facts in the case at bar to the above rule.

(a) The acts of solicitation were not such as to manifest presence.

(b) The flow of merchandise resulting from orders accepted outside Washington and shipped f. o. b. outside points into Washington pursuant to accepted orders is not activity of the shipper in that State—the carrier acts for the buyer.

(c) Such incidents of mere solicitation as display of samples in hotel or other sample rooms rented by agent are without significance on the question of Appellant's presence in the State.

B. The person served did not have authority, express or implied, to receive or accept service.

1. The duties and functions of H. S. Alley in acting for the corporation were limited to the solicitation of orders.

2. Service upon a person as to matters wholly unrelated to his duties is not service upon the corporation for which he solicits orders.

3. The validity of service on Mr. Alley is affected by his interest as a potential beneficiary of the tax.

C. The rule of Flexner v. Farson.

1. Substituted service on an agent of one whom a state cannot exclude is not due process.

2. Appellant's activities in Washington were such that that State lacked control of it. It could not and did not require either registration or appointment of a general agent for service.

3. The attempt to force Appellant to submit to Washington's jurisdiction through service on an order-taker violates due process as there was no right of removal to the Federal courts.

4. The doctrine of lack of jurisdiction when control is absent rests in the due process clause—not the commerce clause, as is demonstrated in cases involving matters at the time held not to be commerce.

II.

Jurisdiction to impose the tax was lacking.

1. Appellant was not doing business in Washington and had no agent in that State for service of process.

2. Even if Appellant had had a resident agent authorized generally to receive service, it could not be subjected to this tax.

(a) Jurisdiction to impose an excise tax depends on granting of a legal privilege to the person taxed.

(b) This case involves a tax upon payment of wages for services.

(c) The payment of wages was not made in Washington and was not under the State's control.

ARGUMENT.

I. The Assessment of the Tax Was Void for Lack of Jurisdiction.

Section 14 (c) of the Unemployment Compensation Act, Rem. Rev. Stat. (1943 Suppl.), sec. 9998-114c (infra, Appendix page iv), provides that service of notice of delinquent assessment (which is necessary to assessment) shall be served upon the employer in the manner prescribed for the service of summons in civil actions. Rem. Rev. Stat., sec. 226 (P. C., sec. 8438), provides:

> "The summons shall be served by delivering a copy thereof as follows: * * * (9) If the suit be against a foreign corporation * * * doing business within this state to any agent, cashier or secretary thereof; * * *"

Certain principles, then, are plain: first, that if Appellant was not doing business in the State of Washington, then there was no jurisdiction to assess the tax in controversy, not only because the statute relied upon as authorizing service upon Appellant by its terms is inapplicable, but also because the requirements of the due process clause of the Fourteenth Amendment to the Federal Constitution invalidate such an assessment. (See Cases cited infra.) Second, that if Mr. E. S. Alley, to whom the notice of assessment was given (R. p. 18), was not an "agent" of Appellant within the sense in which that term is properly used in cases involving jurisdiction, there is no jurisdiction to assess the tax.

At the outset the issue should be clarified by the elimination of certain confusion which seems to have existed below. The issue in this case is not necessarily resolved or settled by the rules concerning the jurisdiction of a court over a non-resident corporation. If under such rules the Washington tribunals and courts had no juris-

diction over Appellant, of course, the judgment below violates due process. But it is entirely possible that without violation of rules concerning jurisdiction of courts, Washington statutes may give them jurisdiction over this foreign corporation in certain matters and still the State may not have jurisdiction to tax it. The question in this case is the jurisdiction of the State of Washington to impose and assess a tax. This is a very different question in principle from that involved in the general subject of jurisdiction of courts over non-resident corporations. For instance:

On the one hand the question of jurisdiction of courts is adjective to the law—a question whether or not a defendant must respond in a tribunal of a plaintiff's choice. In every such case the plaintiff has chosen for a good reason a particular jurisdiction—that in which he resides; that in which the injury was committed or damage suffered; that in which goods allegedly defective were delivered or used. *Davis, Director General of Railroads v. Farmers Cooperative Equity Co.* (1923), 262 U. S. 312, 67 L. Ed. 996. In every such case the question is what jurisdiction will enforce a liability created prior to the service of process questioned.

On the other hand the question of jurisdiction to make the tax assessment purportedly made herein has to do with the creation—the origin of an obligation, because assessment is a condition precedent to the liability. The question of jurisdiction to assess a tax is a question of substantive, not procedural law, for, lacking jurisdiction to assess in Washington, there is not power in any officer of that State to make an assessment elsewhere, and absent a valid assessment the obligation does not exist. Whether or not Missouri would enforce a judgment for taxes, it is clear that neither the Constitution nor general principles of comity require or permit Missouri to make an assessment of taxes in behalf of Washington. It is a question of

control. **Power to assess a tax implies that the state has jurisdiction to license, to regulate, to exclude.**

In *People ex rel. Manila El. R. R. & L. Co. v. Knapp* (1920), 229 N. Y. 502, 508, 128 N. E. 892, it was ruled:

> "The condition of doing business in this state, within that intendment, implies that the foreign corporation is accomplishing acts and activities within the state which the state might reasonably and with ordinary interstate comity interdict or prevent, and the doing of which was a privilege which required governmental consent, supervision and control, and which necessitated or sought governmental opportunity and protection to be compensated or balanced by contributions, through taxation, to the burden of government."

See also: *Von Baumbach v. Sargent Land Co.* (1917), 242 U. S. 503, 61 L. Ed. 460.

In *Hartstein v. Seidenbach's, Inc.* (1927), 129 Misc. 687, 689, 222 N. Y. S. 404, it was said:

> "* * * a lesser degree of business activity is required to authorize service than in the other cases * * *" (as for taxation).

Hence it follows that if the service in this case was not such as would support jurisdiction of a Washington court, it is *a fortiori* not such as would sustain an assessment; that the activities sufficient to sustain jurisdiction to assess are rather like those sufficient to sustain the requirement of a corporate license to do business than like those to sustain a court's jurisdiction. The proposition that Appellant could not be required to register in the State of Washington as a foreign corporation engaged in business there, needs no argument (R. pp. 15-16).

A. Appellant was not doing business in the State of Washington.

It is well settled that to be doing business in a state, even to be sufficient to render a corporation subject to the jurisdiction of the courts of that state, the business must be such as to manifest the presence of the corporation in the state. *St. Louis Southwestern Ry. Co. v. Alexander* (1913), 227 U. S. 218, 57 L. Ed. 486. It is not sufficient that it carries on only interstate activities. It is true that a corporation cannot claim an exemption from state jurisdiction whether for suit or from taxes, merely because it can show that it is engaged solely in interstate commerce. *International Harvester Company v. Kentucky* (1913), 234 U. S. 579, 589, 58 L. Ed. 1479. But it does not follow, and has never been held that the converse is universally true and that all corporations engaged in interstate commerce activities in a state thereby become subject to the state's jurisdiction. On the contrary, in *People's Tobacco Company, Ltd., v. American Tobacco Company* (1917), 246 U. S. 79, 87, 86, 62 L. Ed. 587, this Court in an opinion delivered by Mr. Justice Day, from which there was no dissent, said of a corporation which was engaged in carrying on interstate commerce with Louisiana residents through mere solicitation:

> "The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted. (Citing cases.)

"* * * As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that state, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it. (Citing cases.)"

And in that case this Court expressly distinguished it from *International Harvester Company v. Kentucky*, 234 U. S. 579, as follows:

"The plaintiff in error relies upon International Harvester Company v. Kentucky, 234 U. S. 579, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the state, but there was also authority upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that state."

The case at bar is one where Appellant's whole activity in the State of Washington, if it can be called an activity there, was to cause individuals to solicit orders for its merchandise. The solicitors transacted no business for it. Appellant did not assist them in Washington; they came to Missouri for instructions and samples to assist in procurement of orders. They were not authorized to consummate and did not consummate any sales.

These solicitors cannot be considered a part of Appellant so as to evidence its presence in the State. A retail shoe merchant or any other person could have sent an order for goods, or could have procured a stranger to do

it, with the same effect. Appellant would have accepted or rejected the order; if the order was accepted, it would have been filled. The solicitors of orders exercised no part of the charter functions of Appellant. Appellant is no more within the State of Washington than it would be if a newspaper carried solicitations for orders for its merchandise. But it would not be contended that service on the advertiser might be made on a daily newspaper, in which a foreign corporation advertised, or that such service would become valid if the result of the advertising was a flow of merchandise into the state through shipments made to the purchasers f. o. b. points outside the state. The resultant "continued flow of merchandise" into the state cannot be said to evidence any activity within the state on the part of the foreign corporation. Orders are accepted only outside of the State of Washington. They call for shipment f. o. b. points of shipment which are outside of that state. Consequently, when the goods are shipped as required, the sale is completed and the goods become the property of the purchaser. The carriage of the goods into the state in such a case is done for the buyer and not for the seller. The activities within the state connected with the "flowing of goods into the state" are therefore acts of the buyers and not activities of the seller within the State of Washington.

The only purported "activity other than solicitation" within the state therefore boils down to that of the display of samples by the solicitors in rooms rented for that purpose. That could be the only other activity which brought about a "solicitation plus" in the view of the majority of the Justices of the Supreme Court of Washington. It can be no more of an "other activity" than that of causing advertisements to be displayed in the newspapers of the state claiming jurisdiction, as was the case in *People's Tobacco Company v. American Tobacco Company*, 246 U. S. 79. The statement of this court that solicitation of orders alone

is not the kind of doing business which manifests the presence of a corporation in the state in such a way as to subject it to the local jurisdiction for service of process upon it, is meaningless if it is not applicable when the solicitation involves display of samples. If the renting by salesmen of sample rooms in business buildings is not to be regarded as a mere incident of the solicitation and without determinative significance, then the renting of a room by a traveling salesman in a hotel where he may sleep at night between solicitations, his checking of his personal baggage and his sample cases at hotels or at railroad stations, his eating at eating houses; and other necessary incidents of his being able to carry on solicitations for orders and for which he is reimbursed by the corporation, all become matters of "solicitation plus" so that, under the rule suggested and applied by the majority of the Washington Supreme Court, foreign corporations would always be amenable to process. We submit that the whole activity on the part of Appellant in the State of Washington, as shown by the record in this case, may properly be regarded as mere solicitation of orders insufficient to support jurisdiction to assess, or even to support process for a suit.

As was said by this Court in *Green v. Chicago, Burlington & Quincy Ry. Co.* (1907), 205 U. S. 530, 533, 51 L. Ed. 916, touching the validity of service upon an agent, jurisdiction depended upon

> "* * * whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there."

And in that case it was further said:

> "The business shown in this case was in substance nothing more than that of solicitation. * * * we

think that this is not enough to bring the defendant within the district so that process can be served upon it."

In *Minnesota Commercial Men's Assn. v. Benn* (1923), 261 U. S. 140, 145, 67 L. Ed. 573, it was ruled:

> "* * * we think it cannot be said that the Association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members. That is not enough 'to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted.'"

See also *Bank of America v. Whitney Central National Bank* (1923), 261 U. S. 171, 67 L. Ed. 594.

The rules are stated by the eminent scholar, Joseph H. Beale, in A Treatise on the Conflict of Laws (New York, 1935), Vol. II, p. 844, sec. 179.16, as follows:

> "When the principal part of a transaction is performed outside the state, leaving only one small or incidental feature of it connected with the state, the foreign corporation entering into the transaction is not doing business in the state. This is true of many sales of goods outside the state. Thus, where an agent who only has authority to transmit an offer sends it from within the state to the foreign corporation and it is accepted and acted upon there, there is no business done within the state. So also, where goods are sold outside the state for delivery in the state."

And again, in the same Treatise, p. 847, sec. 179.18:

> "Where a foreign corporation solicits orders in the state by commercial travelers, the orders being transmitted to the corporation at its domicil and there filled, the sale is made and the business is therefore

done at the domicil of the corporation. The foreign corporation in such a case is not doing business in the state. So if a commercial traveler is sent into the state to solicit orders and transmit them to the home office, the foreign corporation is not doing business in the state."

The Supreme Court of Massachusetts, in *Reynolds v. Missouri, Kansas & Texas Railway* (1916), 224 Mass. 379, 386, 113 N. E. 413, has held:

"The mere solicitation of business by a foreign corporation without more commonly has been held not to be the doing of business within a State."

Many other cases involving the question of what business in a state is sufficient to give its courts jurisdiction over a foreign corporation are collected in the cases above cited. A large number of them are digested by Chief Justice Simpson in his dissenting opinion in the court below (R. pp. 86-108). We have thought it unnecessary in this brief to repeat the citation and analysis of these cases. The cases relied on by the majority in the court below, including *Frene v. Louisville Cement Company*, 134 F. (2d) 511, are ably distinguished by Chief Justice Simpson as being, except in two instances, cases where the corporation, in addition to solicitation, employed agents with larger authority and engaged in intrastate activities. The two excepted cases, *Dahl v. Collette*, 202 Minn. 544, 279 N. W. 561, and *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, are shown to have fallen into the error of relying on *International Harvester Company v. Kentucky*, supra, without noting the significance of the factual situation present there, that the corporation, in addition to soliciting business, made collections through agents in the state.

The authorities hold almost without contradiction: that the mere solicitation of orders or business does not con-

stitute such doing of business within a state as will support jurisdiction of a court in the state, even of a cause of action arising in the state. They establish *a fortiori* therefore that it will not support jurisdiction to assess a tax.

B. The person served did not have authority, express or implied, to receive service.

The service was by delivering to and leaving with "one E. S. Alley, a salesman of the International Shoe Company." (Appellant), a copy of the Notice of Assessment (R. p. 18). Reading the Record most favorably to Appellee, it is found that E. S. Alley was employed from the head office in Missouri to work under the direct supervision and control of sales managers with offices in St. Louis, Missouri; that he was required to and did receive in Missouri instructions as to his duties, the lines of shoes to be offered the trade, selling methods and conditions, new types and kinds of shoes. He was given a sample line (one shoe of a pair). He made no sales of the samples. Possibly he was one of the Company's salesmen that rented a sample room in the State of Washington, or used a hotel room or temporary display room; for the expense of which he was reimbursed by Appellant (R. pp. 16-17), but the Record does not show that he was. He had a designated territory in which to solicit orders (R. p. 17).

His authority was **limited to exhibiting samples** of the merchandise, endeavoring to **procure orders, transmitting orders** to Appellant's office; he could not bind the appellant to any contract or conclude any transaction in its behalf, his authority having been limited strictly to the **solicitation of orders** (R. p. 17). The corporation had no office in the State of Washington and had no general agent there (R. p. 16).

It seems clear beyond the necessity of argument that service upon one whose authority is so limited is not serv-

ice upon an agent within the requirements for such service and is not service upon the company. Hence the rule, established in the cases cited above, that service upon a mere order-taker is not sufficient to support jurisdiction.

In *City of Fall River v. Riley et al.* (1886), 140 Mass. 488, 5 N. E. 481, the rule was found squarely that service must be upon one who is an agent:

> "The finding of the jury that the person upon whom the only service was made which is relied upon was not the agent or attorney of the defendant Riley, shows that there was no legal service of the writ, and thus that the court rendering judgment had no jurisdiction of the case."

And in *Dolan v. Keppel* (1920), 189 Iowa 1120, 179 N. W. 515, it was held that service cannot be had upon an agent, where the cause of action was entirely disassociated with the agency.

In *Thornburg v. James E. Bennett & Co.* (1928), 206 Iowa 1187, 1191, 221 N. W. 840, it was ruled:

> "To constitute due process, the agent on whom service is made must be such at the time of the service."

Corpus Juris, Title *Process*, sec. 101, 50 C. J., p. 425, states the rule:

> "Service is not good where the person served is not an agent or where the cause of action is not connected with the business of the agency."

In *Philadelphia & Reading Ry. Co. v. McKibbin* (1917), 243 U. S. 264, 265, 61 L. Ed. 710, Mr. Justice Brandeis, delivering the opinion of this Court, ruled:

> "Even if it [a foreign corporation] is doing business within the State, the process will be valid only if served upon some authorized agent."

See also *People's Tobacco Co. v. American Tobacco Co.* (1917), 246 U. S. 79, 62 L. Ed. 587; *Connecticut Mutual Life Ins. Co. v. Spratley* (1899), 172 U. S. 602, 609, 43 L. Ed. 569.

If it be conceded for the moment that a Washington Court would have had jurisdiction of Appellant in a suit commenced by service upon E. S. Alley and involving, for example, an allegation that merchandise purchased through him was defective, it is still a far cry from this—the type of case cited in the Court below—to a holding even that a court would have jurisdiction by such service of a suit involving an excise tax on employment. E. S. Alley had nothing whatsoever to do with employment of salesmen or payment of their commissions, acts unrelated, in the normal business establishment, to selling. He could not make a contract. It is remarked that this litigation involves a tax measured by the payments to all salesmen, of which the payments to E. S. Alley are only a small part. He could not have knowledge of what the suit was all about, for he could not know the total payments to salesmen who had territory in Washington. Moreover, the salesman in this case is one of the employees for whose potential benefit the tax if upheld is to be applied, and thus he has such a personal interest in the assessment as should disqualify service on him.

In *Armstrong Co. v. New York C. & H. River R. Co.* (1915), 129 Minn. 104, 151 N. W. 917, it was held that an agent designated by the state, through whom service may be had on a foreign corporation, must sustain such relation to the corporation that such service constitutes due process of law. E. S. Alley bore no such relationship to the appellant.

It would be manifestly impolitic to uphold service upon a salesman in a case not involving a sale. It would require of mere soliciting salesmen, notoriously happy-go-lucky fellows, good mixers, a higher degree of judgment

and responsibility than that for which they are selected, if corporations are to be bound by service on them. It would require of mere soliciting salesmen qualities which are rarely found in them. It is not required to protect the interests of citizens of the state into which they travel.

An assessment of tax goes to the very heart of corporate management. It affects the corporate capital, the charter, the whole business. Taxation has become a matter of the gravest import to business. It therefore ought to require notice to the more responsible individuals, to persons who may be said generally to represent it with respect to such matters, not notice to mere order-takers. The responsibility is such that it is only within the scope of the authority of a president, a cashier, or of an agent having discretion as is the case of one who has authority to close contracts or transactions for the corporation within the taxing state, or who has express authorization to accept service of process.

C. **The rule of Flexner v. Farson.**

In *Flexner v. Farson* (1919), 248 U. S. 289, 63 L. Ed. 250, a leading case, in a characteristically succinct opinion by Mr. Justice Holmes, it was ruled that substituted service on an agent of an individual was not due process of law, because a state cannot exclude an individual from doing business. The validity of substituted service upon a corporation in certain instances is sustained because a state can exclude a foreign corporation; therefore may impose as a condition of its entry that it submit to service upon an agent. The reasoning, like most of Holmes' reasoning, is far reaching in both its sources and its effects. It means, that substituted service is a kind of control, and that the same principles which determine whether or not a state may control a foreign entity determine the validity of substituted service.

The State of Washington may not **control** the business

of Appellant, and has not attempted to require registration in Washington, nor the appointment of a general agent in the State authorized to accept service of process. It is not perceived how, lacking power to compel the appointment of such an agent, the State can still compel the foreign corporation to be bound by service on a salesman who is not such an agent. The meaning of *Flexner v. Farson* is that there was no jurisdiction to assess Appellant by service on its agent. It is submitted that that is the ruling of this leading case.

It had been held long before *Flexner v. Farson* that substituted service could be had upon a corporation doing business in a state, even though the business was not such as would justify the requirement that the corporation register in the State. The rule was not disturbed by *Flexner v. Farson*. It is clear that substituted service against a foreign corporation in a suit by a resident is not itself control by the State, because the corporation may remove the suit to the federal courts, which are not agents of the State. The question is therefore rather akin to one of venue than one of jurisdiction. Such cases involve only questions of conflict of laws and not constitutional questions of power. But there is no provision for removal of an assessment proceeding to the federal courts or to any other federal agency. A proceeding to which a State is a party cannot be removed to the federal courts. *Stone v. South Carolina* (1886), 117 U. S. 430, 29 L. Ed. 962. The assessment is in this respect similar to a criminal proceeding, and it has never been held that criminal jurisdiction can be obtained by substituted service in such a case, unless the corporation had been licensed to do business in the state.

The prohibition of jurisdiction when control is lacking rests in the due process clause of the Constitution, not the

commerce clause. This is demonstrated by the rulings in such cases as *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, and *Allgeyer v. Louisiana* (1897), 165 U. S. 578, 41 L. Ed. 832, which were ruled under the decision that selling insurance is not commerce. *Paul v. Virginia* (1868), 8 Wall. 168, 19 L. Ed. 357.

II. Jurisdiction to Impose the Tax Was Lacking.

It is submitted that it has been shown that there was no jurisdiction to take proceedings against appellant to collect the contribution in controversy. It is further submitted that there was no jurisdiction, no power, to impose liability upon Appellant.

First, it has been shown that Appellant was not doing business in Washington; had no agent in that state for the service of process. Since this is so, it follows *a fortiori* that appellant was not subject to the power of the laws of the State of Washington, especially with respect to such transactions as employment and payment of salesmen, which did not occur in that state.

But, second, even if Appellant was doing business in Washington; even if it had appointed a resident agent expressly authorized generally to receive service of process in Washington, it could not be subjected to this contribution.

The record is silent whether or not Missouri has taxed this employment. It is believed that there is no question but that it could tax it, in view of the reasons which will be set out later. To hold that payment of wages may be taxed where the work is performed would make an unworkable rule, because most salesmen travel in more than one state, and in many instances an allocation of payments to work performed in each state is impossible.

Again Beale in the work previously cited (Vol. I, p. 519, sec. 118 A. 3) states the rule:

> "A personal tax may be laid upon persons subject to the jurisdiction of the state; a property tax upon all property situated in its territory; **an excise or license tax upon all privileges granted by its law**: including privilege to do acts, to carry on business, to take benefit from the law, etc." (Emphasis supplied.)

And at page 623, sec. 118 F. 2:

> "The jurisdiction to impose an excise tax depends on the granting of a legal privilege by the state whether the act be done by or the privilege granted to one domiciled within the state or a foreigner."

And at page 627, sec. 118 F. 4, the same learned author writes of instances

> "in which a State has sought to tax that which lies beyond the State's taxing power, such as the taxing of property situated or an act done in another State. The objection to the tax will be raised, as a federal question, under the 'due process' clause of the Fourteenth Amendment. It is then a question of Constitutional law, but it also involves the problem of jurisdiction to tax, and is therefore a problem in Conflict of Laws as well."

It will be observed that there is no difference in principle here between a direct tax, as a tax on land or a poll tax, and an indirect tax, as an excise on a privilege. One may speak of the "situs" of the privilege, meaning the place where it may be taxed, the place where the laws authorize the exercise of the privilege and where it is exercised. If the sovereign power does not extend over the land, the person or the privilege, to seize or destroy it or him, the sovereign may not impose a tax.

> "All subjects over which the sovereign power of a state extends are objects of taxation, but those over

which it does not extend are upon the soundest principles, exempt from taxation." McCulloch v. Maryland (1819), 4 Wheat. 316, 429.

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business." State Tax on Foreign Held Bonds (1872), 15 Wall. 300, 319, 21 L. Ed. 179.

In *Commonwealth v. Standard Oil Co.* (1882), 101 Pa. St. 119, it was held that jurisdiction to tax a privilege depends upon the fact that the law of the taxing state grants the privilege.

So, also, *St. Louis Cotton Compress Co. v. Arkansas* (1922), 260 U. S. 346, 67 L. Ed. 297, wherein it was held that Arkansas could not tax premiums paid elsewhere.

In *Keeney v. Comptroller of New York* (1912), 222 U. S. 525, 56 L. Ed. 299, it was held that New York could not tax a gift made in Texas, even by a resident of New York.

In *Provident Savings Life Assurance Society v. Kentucky* (1915), 239 U. S. 103, 60 L. Ed. 167, it was held that Kentucky could not collect a tax on doing business in the state from a company whose activities in the state did not constitute doing business.

See also: *State v. International Paper Co.* (1922), 96 Vt. 506, 120 A. 900; *James v. Dravo Contracting Co.* (1937), 302 U. S. 134, 82 L. Ed. 155; *Silas Mason Co. v. Tax Commission* (1937), 302 U. S. 186, 82 L. Ed. 187; *Fidelity & Deposit Co. of Maryland v. Tafoya* (1926), 270 U. S. 426, 70 L. Ed. 664.

The principles governing this aspect of this case are clear, although, so far as we have found, the exact question is *res integra*.

The tax in question is imposed by Laws, 1937, ch. 162, sec. 7, as amended by Ch. 214, Sec. 5, Laws 1939 (Rem. Rev. Stat., sec. 9998-107), in words as follows:

"On and after January 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment . . . ."

This is a tax upon payment of wages for services. It is not a tax on rendering services for wages. The statute is clear and unambiguous. The similar tax imposed by the federal Statute (49 Stat. 639, 26 U. S. C. A., sec. 1600) has been so construed. *Steward Mach. Co. v. Davis* (1937), 301 U. S. 548, 81 L. Ed. 1279.

The payment of wages was not made in Washington. It was stipulated (R. p. 17) that such transactions as appellant had with persons who reside in the State of Washington involving the sale and distribution of its merchandise to merchants in the State of Washington were conducted as described. No mention is made of payment of wages. *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, determines this case. The payment of wages is not made pursuant to Washington law, but pursuant to Missouri law. This is the excisable act—payment of wages—similar to the making of a gift in *Keeney v. Comptroller of New York*, 222 U. S. 525.

In the case of property taxed, a fair test of jurisdiction is power to seize the property to satisfy the tax liability. Thus a state may tax property within its territorial limits. In the case of a privilege tax, a fair test is power to prevent the exercise of the privilege. Thus, New York could not prevent the transfer of Texas real estate, and had no jurisdiction to tax such a transfer (*Keeney v. Comptroller of the State of New York*, 222 U. S. 525), and Arkansas could not prevent the payment of premiums paid for insurance even on Arkansas risks (*St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346; *State v. International Paper Co.*, 96 Vt. 506, 120 A. 900).

In the instant case, Washington could not prevent the employment and instruction of salesmen in Missouri, nor the payment of their wages. This much is clear. It is

also true that Washington could not exclude the salesmen from Washington or prevent their soliciting for nonpayment of the contribution. Nor can it forfeit the charter of appellant, to satisfy or enforce the demand. Assuming that Washington can make an assessment, it cannot satisfy it. It has never been held that an assessment is enforceable in another state. *Moore v. Mitchell* (1930), 281 U. S. 18, 74 L. Ed. 673.

Hence, the assessment in this case, even affirmed by the Supreme Court of Washington, must be considered a nullity, since it cannot be enforced. Jurisdiction to impose a liability must mean power to impose and enforce it, and power is lacking here. The judgment of the State Court can have no more validity than the assessment of which it is merely an affirmation.

CONCLUSION.

Appellee claims that Appellant is subject to the State of Washington's jurisdiction to tax because it paid, in the State of Missouri, wages for services in Washington solely incident to the initiation of transactions in interstate commerce ultimately terminating in Washington.

The cases ruling that jurisdiction of the courts over a foreign corporation, otherwise present in the state, is not ousted merely because its business is all in interstate commerce, are only enlightening—one step on the way—upon the question of jurisdiction of a state to tax a foreign corporation.

Although the fact that its business is solely in interstate commerce may not exempt a foreign corporation from amenability to suit its engagement in interstate commerce does not of itself subject it to state control and power to tax. The contention, when made against the jurisdiction of the courts, where such jurisdiction otherwise exists under principles of comity, based upon business being in interstate commerce is a claim of exemption from such

jurisdiction—ousting of existing jurisdiction. But as to power to tax, the claim of the state is here made affirmatively that its interstate commerce alone brings the foreign corporation into the state—makes it ipso facto subject to its control.

In *Baldwin v. Missouri*, 281 U. S., l. c. 596, Mr. Justice Holmes, dissenting, conceded that it would "be good policy to restrict taxation to a single place," but he concluded that there was nothing in the Constitution to prevent double taxation. (The view of Mr. Justice Holmes subsequently became that of the majority. *Curry v. McCanless*, 307 U. S. 357.) In this case the Court is asked to sustain jurisdiction to tax upon principles which were never heretofore believed to sustain such jurisdiction, and thereby to magnify what is concededly an economic evil. Moreover, this would not result in systematic or uniform application of the tax either against corporations or against non-corporate employers. Concededly, if the Court sustains the ruling of the Supreme Court of the State of Washington, corporations may be subjected to multiple taxation, while partnership or individual employers similarly engaged would not be subject to the jurisdiction of the State of Washington or of any other foreign state.

Respectfully submitted,

LEOPOLD M. STERN,
T. M. ROYCE,
LAWRENCE J. BERNARD,
JACOB CHASNOFF,
ABRAHAM LOWENHAUPT,
408 Pine Street,
St. Louis (2), Missouri,
Attorneys for International Shoe Company, Appellant.

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APPENDIX.

The pertinent portions of the statutes of the State of Washington, the validity of which are involved in this case, are here set forth. The order in which the several sections of the statutes involved are here arranged is not that followed in the references thereto in the Assignments of Error, but is that in which the sections appear in the Unemployment Compensation Act, as amended, and in effect during the period covered by the assessment, followed by other statutes referred to in the Unemployment Compensation Act.

Section 6 of Chapter 162 of the Laws* of 1937, as amended by Section 4 of Chapter 214 of Laws of 1939, and by Section 4, Chapter 253, Laws 1941, page 881; Rem. Rev. St.,** 1941 Suppl., Sec. 9998-106-c-d-e, pages 501-503:

* * * * * * *

"Section 6. (c) Appeals. When an appeal is taken, as provided in the foregoing section, unless such appeal is withdrawn, an appeal tribunal, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the unemployment compensation division. The parties shall be duly notified of such tribunal's decision, together with its reasons therefor, which shall be deemed to be the final decision on the claim, unless within ten days after the date of notification or mailing, whichever is the earlier, of such decision, further appeal is initiated pursuant to section 6 (e).

"Section 6. (d) Appeal Tribunals. The Commissioner shall establish one or more impartial appeal tribunals each of which shall be presided over by a salaried Examiner who shall decide the issues submitted to the tribunal. No Examiner shall hear or decide any disputed claim in any case in which he is an interested party.

*Laws, as herein used, refers to Session Laws of Washington.
**Refers to Remington's Revised Statutes of Washington.

"Section 6. (e) Review. The Commissioner may on his own motion, or upon the petition of any interested party, shall, affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence. The Commissioner may transfer to another appeal tribunal the proceedings on any claim pending before an appeal tribunal.

. . . . . .

"Section 6. (i) Court Review. Within thirty days after final decision has been communicated to any interested party, such interested party may appeal to the Superior Court of the county of his residence, and such appeal shall be heard as a case in equity but upon such appeal only such issues of law may be raised as were properly included in his application before the appeal tribunal. The proceedings of every such appeal shall be informal and summary, but full opportunity to be heard upon the issues of law shall be had before judgment is pronounced. Such appeal shall be perfected by filing with the Clerk of the Court a notice of appeal and by serving a copy thereof by mail or personally on the Commissioner, and the filing and service of said notice of appeal within thirty days shall be jurisdictional. The Commissioner shall within twenty days after receipt of such notice of appeal serve and file his notice of appearance upon appellant or his attorney of record, and such appeal shall thereupon be deemed at issue. No bond shall be required on such appeal or on appeals to the Superior or the Supreme Courts. When a notice of final decision has been placed in the United States mail properly addressed, it shall be considered prima facie evidence of communication to the appellant and his attorney, if of record.

"The Commissioner shall serve upon the appellant and file with the Clerk of the Court before trial a certified copy of his complete record of the claim which shall upon being so filed become the record in such case. No fee of any kind shall be charged the Commissioner

for filing his appearance or for any other services performed by the Clerk of either the Superior or the Supreme Court.

"If the Court shall determine that the Commissioner has acted within his power and has correctly construed the law, the decision of the Commissioner shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the Superior Court shall refer the same to the Commissioner with an order directing him to proceed in accordance with the findings of the Court: Provided, That any award shall be in accordance with the schedule of unemployment benefits set forth in this act.

"It shall be unlawful for any attorney engaged in any such appeal to the Courts as provided herein to charge or receive any fee therein in excess of a reasonable fee to be fixed by the Courts in the case, and if the decision of the Commissioner shall be reversed or modified, such fee and the fees of witnesses and the costs shall be payable out of the Unemployment Compensation Administration Fund. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the Superior Court to the Supreme Court as in other civil cases. In all Court proceedings under or pursuant to this act the decision of the Commissioner shall be prima facie correct, and the burden of proof shall be upon the party attacking the same."

Section 7 of Chapter 162 of the Laws of 1937, as amended by Section 5 of Chapter 214 of the Laws of 1939 and by Section 5, Chapter 253, Laws of 1941, page 884; Rem. Rev. St., 1941 Suppl., Sec. 9998-107-a-b, p. 504:

"Section 7. (a). **Payment.**

"(1) On and after January 1, 1937, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment (as defined in section 19 (g)) occurring during such cal-

endar year, such contributions shall become due and be paid by each employer to the treasurer for the fund in accordance with such regulation as the Commissioner may prescribe, and shall not be deducted, in whole or in part, from the remuneration of the individuals in his employ;

"Section 7. (b) **Rate of Contribution.** Each employer shall pay contributions equal to the following percentages of wages payable by him with respect to employment:

"(1) One and eight-tenths (1.8%) per centum with respect to employment during the calendar year 1937;

"(2) Two and seven-tenths (2.7%) per centum with respect to employment during the calendar years thereafter."

Section 14 of Chapter 162 of the Laws of 1937, as amended by Section 12 of Chapter 214 of the Laws of 1939 and by Section 11, Chapter 253, Laws of 1941; p. 904; Rem. Rev. St., 1941 Suppl., Sec. 9998-114-c-e, pp. 521-522:

"Section 14 (c). At any time after the Commissioner shall find that any contribution or the interest thereon have become delinquent, the Commissioner may issue a notice of assessment specifying the amount due, which notice of assessment shall be served upon the delinquent employer in the manner prescribed for the service of summons in a civil action, except that if the employer cannot be found within the state, said notice will be deemed served when mailed to the delinquent employer at his last known address by registered mail. If the amount so assessed is not paid within ten days after such service or mailing of said notice, the Commissioner or his duly authorized representative shall collect the amount stated in said assessment by the distraint, seizure and sale of the property, goods, chattels and effects of said delinquent employer. There shall be exempt from distraint and

sale under this section such goods and property as are exempt from execution under the laws of this state.

. . . . . .

"Section 14 (e). When any notice of assessment has been delivered or mailed to a delinquent employer, as heretofore provided, such employer may within ten days thereafter file a petition in writing with the Commissioner, stating that such assessment is unjust or incorrect and requesting a hearing thereon. Such petition shall set forth the reasons why the assessment is objected to and the amount of contributions, if any, which said employer admits to be due the Division of Unemployment Compensation. If no such petition be filed with the Commissioner within said ten days, said assessment shall be conclusively deemed to be just and correct. The filing of a petition on a disputed assessment with the Commissioner shall stay the distraint and sale proceedings provided for in this section until a final decision thereon shall have been made, but the filing of such a petition shall not affect the right of the Commissioner to perfect a lien, as provided in section 14.(b), upon the property of the employer. The issues raised by such petition shall be heard by the appeal tribunal, established in section 6 of this act, in the same manner and in accordance with the same procedure as is prescribed for appeals from benefit determinations, including the procedure set out in section 6 for review by the Commissioner and the Court."

Section (g) (1) of Section 16 of Chapter 214, page 856, of the Session Laws of Washington of 1939; 10 Rem. Rev. St., Pocket Part 1-326, Sec. 9998-119 (g) (i), is as follows:

. . . . . .

"Sec. 16.

"(g) (1). 'Employment,' subject to the other provisions in this subsection, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

An unnumbered section in Chapter 214 of the Laws of 1939 designated as Section 9998-119 (a) of Remington's Revised Statutes (Supp.), as amended by Section 14, Chapter 253, Laws of 1941, p. 915; Rem. Rev. St., 1941 Suppl., Sec. 9998-c-d-e-f-g, pp. 529-531:

"Section 19 (c). 'Commissioner' means the administrative head of the State Office of Unemployment Compensation and Placement referred to in section 10 of this act.

"Section 19 (d). 'Contributions' means the money payments to the state unemployment compensation fund required by this act.

"Section 19 (e). 'Employing Unit' means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1937, had in its employ one or more individuals performing services for it within this state. * * *

"Section 19 (f). 'Employer' means:

* * * * * * * * *

"(2) Prior to July 1, 1941:

"(a) Any employing unit which in each of twenty different weeks within either the current or the preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment eight or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week);

"Section 19 (g) (2). The term 'employment' shall include an individual's entire service performed within, or both within and without this state if:

"(i) The service is localized in this state; or

"(ii) The service is not localized in any state but some of the service is performed in this state and

"(a) the base of operations, or if there is no base of operations, then the place from which such service is directed or controlled is in this state; or

"(b) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed; but the individual's residence is in this state.

"(3) Services not covered under paragraph (2) of this section, and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the Federal government, shall be deemed to be employment subject to this act, if the individual performing such services is a resident of this state and the Commissioner approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this act.

"(4) Service shall be deemed to be localized within a state if:

"(i) The service is performed entirely within such state; or

"(ii) The service is performed both within and without such state, but the service performed without the state is incidental to the individual's service within such state, for example, is temporary or transitory in nature or consists of isolated transactions."

Section 7 of Chapter 127 of the Session Laws of the State of Washington of 1893, p. 410; Rem. Rev. St. Vol. 2, sec. 226:

"Section 7. The summons shall be served by delivering a copy thereof as follows:

. . . . . .

"(9) If the suit be against a foreign corporation or non-resident joint stock company or association doing business within this state, to any agent, cashier or secretary thereof."

Chapter 86 of the Session Laws of the State of Washington of 1895, p. 170, Rem. Rev. St., Vol. 2, sec. 220:

"Section 1. Civil actions in the several superior courts of this state shall be commenced by the service of a summons as hereinafter provided; * * *".